STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2005
v	No. 252860 Washtenaw Circuit Court
KENNETH EARL LOVEJOY, Defendant-Appellant.	LC No. 01-001822-FC

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, for the beating death of the victim, his housemate and girlfriend. Defendant was sentenced to twenty-five to forty years' imprisonment. He appeals as of right. We affirm.

The victim lived in defendant's house for many years preceding her death, except for a brief time period in August 1998. Jeff Knoll, a boarder in defendant's house, testified that the victim and defendant had many "drunken" arguments during 1998 when he lived with them. During these arguments, defendant would become angry and aggressive. He usually dominated the situation. During one argument, Knoll heard the victim take a hard fall. He did not telephone the police, however, because he believed the victim was okay. Several of defendant's neighbors confirmed that the victim and defendant often argued.

Knoll was on vacation when the victim died. When he left for his vacation, there was no hole in the hallway wall in defendant's house. An acquaintance dropped the victim off at defendant's house at approximately 3:30 p.m. on September 14, 1998. She testified that there was no hole in the hallway wall at that time. Sometime after 11:00 p.m. on the evening of September 14, 1998, two neighbors heard yelling coming from defendant's home. One of the neighbors specifically recognized defendant's loud voice emanating from his home. The other neighbor, who was standing near the street speaking with a friend, could not identify the voices, but she testified that she also heard a thumping sound. Earlier that night, defendant was at a bar and consumed several alcoholic beverages. There was evidence that the victim telephoned him at the bar, prompting him to complain to a waitress that the victim was checking up on him.

Defendant called for emergency assistance at approximately 5:30 a.m. on September 15, 1998. He claimed that he did not see the victim when he arrived home from the bar at approximately 10:30 p.m. the previous evening. He simply went to sleep on a couch in a back

room. He awoke at approximately 4:25 a.m. on September 15, 1998, and got ready for work. He then noticed that the coffee pot was on and coffee was "perking." He assumed the victim was in the house because of the coffee, and he looked for her. Only then did he find the victim in a pool of blood in one of the home's bedrooms. Defendant, who smelled of intoxicants, was drinking coffee when he talked to officers at the scene. He suggested that the victim, who was missing part of one leg, had fallen into a wall.

The first officer to see the victim observed that she had dry, crusty blood on her face and leg. There was also dry, crusty blood on the bed by the victim. The victim had no pulse and was cold to the touch. There was a large hole in the hallway wall, twelve inches from the ground. Clumps of hair were found on the wall and on the hallway carpeting below the hole. While there was no blood in or around the immediate hole, there were medium-velocity, impact bloodstains above and to the side of the hole. Impact spatter is caused when force is imparted to an area that is already bloody. An expert testified that the source of the blood, which caused the impact spatter, was away from the hallway wall when it was impacted. The blood belonged to the victim. Older blood, not associated with the time of the crime, was found in the living room of defendant's home. That blood was also identified as belonging to the victim.

The medical examiner testified that the victim suffered extensive injuries including impacts to six areas of her head. The brain swelling caused a gradual death. The injuries, all but one of which were fresh, could not have been caused by a single fall. Moreover, the force that caused the victim's head injuries was not typical of the force sustained in a normal falling injury. In other words, falling to the floor and hitting one's head on the wall would not have produced the victim's injuries. The medical examiner opined that, if all of the injuries occurred in a relatively close time sequence, the victim probably died two or three hours after being beaten, and she was dead for approximately two or three hours before her picture was taken by the police, which was sometime before 6:00 a.m.

Defendant's version of events was discredited at trial. While defendant claimed to have gone to sleep immediately upon arriving home from the bar at approximately 10:30 p.m., a neighbor heard him yelling after 11:30 p.m. Moreover, a telephone call was placed from defendant's home telephone at 1:14 a.m. on September 15, 1998. Additionally, while defendant testified that he looked for the victim after observing that coffee was made, the victim could not have made the coffee. She was dead for a period of time before the police were summoned. And, the coffee was not automatically brewed because the time set for the automatic brew cycle was 8:45 a.m., well after the police arrived. Moreover, there was circumstantial evidence of defendant's involvement in the victim's death. A sock containing the victim's blood was found in the bedroom where she was discovered. The sock was similar to socks found in a dresser drawer in defendant's bedroom. The drawer contained men's underwear in addition to similar socks. A drop of the victim's blood was also found on defendant's dresser in his bedroom. And, the victim's blood was found in several areas on a pair of defendant's pants. Some of this blood was determined to be impact spatter.

I

Defendant first argues that his statement, taken on September 15, 1998, should have been suppressed because he was not provided with *Miranda*[1] warnings before giving that statement. He argues that, because he was in custody, he should have been advised of his rights. The trial court's factual findings after a suppression hearing are reviewed for clear error. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). The critical issue whether defendant was in custody, however, is reviewed de novo. *Id.* The trial court determined that defendant was not in custody and thus, was not entitled to *Miranda* warnings before giving his statement. Upon our de novo review, we agree.

> *Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of the investigation. Custodial interrogation is "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" [*Id.* at 395-396 (citation omitted).]

In other words, "[a]n officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with formal arrest." *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997). When determining whether a defendant was in custody at the time of interrogation, the totality of the circumstances is reviewed. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001) The key question is whether the accused could reasonably have believed that he was not free to leave. *Id.* Objective circumstances are reviewed rather than the subjective views harbored by the interrogating officers or the person being interviewed. *Id.*

The totality of the objective circumstances in this case supports that defendant was not in custody at the time he made his statements to the police. Defendant summoned the police to his house when he called for emergency assistance. Police arrived to find defendant on his front porch, drinking coffee and smoking. At the scene, Detective Bell explained to defendant the normal procedure followed in a death investigation. Defendant agreed to go to the police station, stating that it was "no problem." If defendant had not agreed to voluntarily go to the station, he would not have been arrested or forced to go.[2] Defendant's status as a witness or suspect was unclear when he was asked to proceed to the station. According to police, defendant was not clearly the focus of the investigation, but any person who finds a body is considered a suspect or an important witness.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Detective Bell testified at the suppression hearing that he had previous contacts with defendant and had arrested him on a prior occasion. At that time, defendant was placed in handcuffs, informed of his arrest, and placed in the back of a police car. Defendant had been arrested on many other occasions as well.

Arrestees are never allowed in the front seat of a police car, and they are handcuffed and informed that they are under arrest. Defendant proceeded to the police station in the front seat of Detective Bell's vehicle, and he was not handcuffed, restrained, or placed under arrest. Defendant was taken through a side door, not through the jail entrance, and was seated in an interview room without a lock. Defendant was not handcuffed in the interview room, was not threatened, was not told that he had to stay, and was not formally arrested. He was interviewed for approximately one hour. Defendant was left alone while the investigation continued. Defendant gave written consent to search his home and was asked to take a polygraph examination. When he expressed his reservations regarding the examination, defendant was able to go outside with the polygraph examiner, smoke, and discuss the examination.

Defendant never asked to leave the station. Later in the day, the detectives were ordered to stop contact with defendant because his sister was hiring an attorney. Defendant waited outside for his sister and left with her when she arrived. Defendant was not wearing his own clothes when he left the station because, at some time before he left, the police obtained search warrants for his house and clothes. The clothes were sought and collected in case defendant became the suspect. The police had insufficient information to arrest defendant and did not do so. Defendant returned to his home while the crime laboratory personnel were still there. He was arrested for the victim's murder approximately three years later.

The objective circumstances reveal that defendant voluntarily went to the police station, was not treated as an arrestee, was allowed to leave when his sister came to get him, never previously asked to leave the station, and was never told that he was under arrest or had to stay with the police. Defendant also knew his rights and understood the arrest process, having been arrested on eight or nine prior occasions. Moreover, he was not questioned in an accusatory or threatening fashion at any time and was not subject to intensive, lengthy questioning. Further, he was not continually in the presence of officers or under their watch while at the station. He spent substantial time alone in an interview room and was also outside, alone, before leaving with his sister. Because defendant was not in custody, it was unnecessary for the police to advise him of his *Miranda* rights. *Peerenboom, supra* at 197-198.

II

Defendant next argues that numerous instances of prosecutorial misconduct denied him a fair trial. Many of the alleged errors are preserved because the challenged conduct was met with an objection at trial. We review preserved issues of prosecutorial misconduct by evaluating the prosecutor's conduct in context to determine if defendant was denied a fair and impartial trial. *People v McLaughlin,* 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first argues that the prosecutor impermissibly violated a pretrial ruling with respect to the questioning of witness Renee Brodie regarding domestic violence between the victim and defendant. We disagree. At trial, the prosecutor followed the terms of the pretrial order when conducting his direct examination of Brodie. On *cross*-examination, defendant asked Brodie what she said to her friend after hearing noises on September 14, 1998. Before answering the question, Brodie inquired whether she could answer. The prosecutor informed her that she could answer the question because defendant had asked it, and the trial court subsequently

ordered Brodie to answer the question. Brodie responded that she told her friend that the noise sounded like domestic violence. Defendant was surprised by the testimony and, contrary to defendant's claims on appeal, the prosecutor was apparently also surprised. While defense counsel objected, arguing that the prosecutor committed misconduct by telling Brodie to answer the question, the trial court pointed out that defense counsel invited the testimony. It also expressed concern that defense counsel appeared to be trying to mislead and confuse the jury with respect to Brodie's testimony. Specifically, defendant was trying to leave the jury with the impression that Brodie heard nothing but "some" noise "out there in the universe." The trial court did not find that the prosecutor committed misconduct, and it informed the prosecutor that he may redirect Brodie with respect to what she heard, as long as Brodie did not restate her own conclusion that there was "domestic violence." Like the trial court, we find no prosecutorial misconduct. The prosecutor did not invite the testimony and did not violate the pretrial order. Moreover, a defendant cannot complain about the admission of testimony that he invited. *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982).

Defendant also challenges the prosecutor's later questioning of the detective, who took Brodie's statement, alleging that it violated the pretrial orders. We disagree. The prosecutor did not seek to elicit any testimony about Brodie's conclusion that there was domestic violence at defendant's house. Thus, he did not violate the pretrial order. Moreover, keeping in line with the trial court's ruling, the prosecutor simply provided the jury with an accurate factual background of Brodie's statement to the police without mentioning her subjective conclusion. Prosecutorial misconduct cannot be predicated on a good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, the prosecutor made a good-faith effort to accurately portray the statements made by Brodie to the police without violating the pretrial order or prejudicing defendant. The trial court sanctioned the prosecutor's approach, and we find no misconduct that denied defendant a fair trial. *Herndon, supra.*

Defendant additionally argues that the prosecutor improperly mentioned, during closing argument, that the portion of Brodie's police statement, which was shown to the jury, was "doctored or deleted." Defendant argues that, because the statement about "domestic violence" was redacted in accordance with the pretrial order, the prosecutor's argument was improper. We agree that the argument was improper because it suggested to the jury that defense counsel was deliberately hiding information from the jury when, in fact, he was complying with a favorable legal ruling of the trial court. A prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury. *Watson, supra* at 592. Nevertheless, the argument did not deny defendant a fair trial. The trial court sustained defendant's objection to the argument, and the prosecutor ceased his line of argument. The jury was subsequently instructed that the statements, comments, and arguments of the attorneys were not evidence to be considered. Thus, any prejudice was cured. We further note that preserved, nonconstitutional errors do not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). It does not affirmatively appear that the prosecutor's isolated comment, to which an objection was sustained, affected the outcome of defendant's trial. Therefore, reversal is not required. *Id.*

Defendant next argues that the prosecutor committed misconduct when he elicited and argued evidence prohibited by the trial court's ruling under MRE 404(b). Although evidence of other assaults to other women by defendant was excluded, the defense did not seek to exclude

evidence of older blood as improper MRE 404(b) evidence. Thus, his argument on appeal is not preserved.[3] The bloodstain evidence found in the living room was not a subject of the MRE 404(b) motion. Thus, we cannot conclude that the challenged evidence violated the pretrial order. Moreover, in his statement to the police, defendant admitted that he hit the victim on two previous occasions. We cannot conclude from the record that this bloodstain evidence was necessarily inconsistent with the permissible testimony about the two prior assaults. Additionally, we note that there was no actual testimony that the older bloodstains on the living room wall were caused by any act perpetrated by defendant. Thus, the bloodstains were not, by themselves, evidence of additional assaults perpetrated by defendant against the victim. The bloodstain evidence was explained to the jury by the expert without speculation regarding when or how it got on the wall. Prosecutorial misconduct cannot be predicated on a good-faith effort to admit evidence. *Noble, supra.* We therefore conclude that the prosecutor's act of offering the crime-scene evidence, which was not prohibited by the pretrial order, does not constitute misconduct.

Defendant, however, also challenges the prosecutor's use of the older bloodstain evidence in his closing argument. The prosecutor's use of the bloodstain evidence during closing argument did not constitute misconduct. The evidence was admitted without objection and, as previously discussed, it did not violate the pretrial order.

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [*People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

A prosecutor is not required to state inferences or conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In this case, defendant has articulated no rationale for the preclusion of the bloodstain evidence, other than his incorrect position that it was inadmissible under the pretrial order. Moreover, defendant admitted that evidence of his striking the victim on two prior occasions was relevant and admissible to demonstrate discord in the relationship to explain motive. During closing argument, the prosecutor argued the evidence and reasonable inferences. He did not argue that the bloodstain evidence proved the existence of assaults other than those defendant admitted. Additionally, the jury was instructed that it had to decide the case based on the evidence and not the arguments or comments of the attorneys. Under the circumstances, the challenged argument did not deprive defendant of a fair trial.

Defendant next argues that the prosecutor impermissibly attacked the veracity of defense counsel on two occasions. We do not find that either of the challenged comments denied defendant a fair trial. "A prosecutor cannot personally attack the defendant's trial attorney." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). He may also not assert or imply that defense counsel is trying to mislead the jury. *Watson, supra* at 592. In *People v*

[3] Generally, an objection based on one ground is insufficient to preserve an appellate attack based on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Lawton, 196 Mich App 341, 354; 492 NW2d 810 (1992), however, this Court recognized that, in "the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial."

In this case, the comments were made during the questioning of separate witnesses on different days at trial. While the first comment was clearly improper, the trial court admonished the prosecutor in front of the jury and informed the jury that the comment was improper. The second comment, like the first, was met with objection, and the trial court instructed the prosecutor to restart his questioning. The jury was later instructed that the lawyer's comments and arguments were not evidence. We conclude that any prejudice the two comments may have had in this well-tried, vigorously argued case, was effectively cured by the trial court's handling of the objections and final instructions. Defendant is not entitled to relief based on his claim of prosecutorial misconduct.

Defendant next argues that the prosecutor shifted the burden of proof during closing argument. We disagree. A prosecutor's statement that inculpatory evidence is undisputed does not inevitably shift the burden of proof. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). While a prosecutor's comments which infringe on a defendant's right not to testify may constitute error, a prosecutor may comment on the defendant's failure to call or produce witnesses to support an alternate theory of the case, if one is offered. *People v Fields*, 450 Mich 94, 111-112, 115; 538 NW2d 356 (1995). The argument that corroborating witnesses or evidence have not been produced merely points out the weakness in the defendant's case. *Fields, supra* at 112. Unless the prosecutor's comments burden the defendant's right not to testify, or unless they allocate any burden to defendant to disprove an element of the offense, they are not improper. *Id.* at 112-113.

In this case, the prosecutor did not shift the burden of proof, improperly comment on defendant's failure to testify, or call upon defendant to prove anything. Rather, his comments were designed to bolster the prosecution theory that defendant had motive or reason to harm the victim. The comments attacked the defense theory that, if there was a homicide, someone else could have been responsible. In his closing argument, defendant argued, as anticipated by the prosecutor, that the victim may have been with someone else on the night of her death or that she may have invited someone into the house. Defendant argued that there were "certain people" who could not be excluded when considering what occurred, including the victim's friend, Willis Blankenship. We conclude that the prosecutor's comment on the absence of evidence to support that someone else had motive did not shift the burden of proof.

Finally, defendant argues that the prosecutor's statement at the end of his initial closing argument constituted an improper appeal to juror sympathy. The prosecutor asked, on behalf of the People of the State of Michigan and the family of the victim, for the jury to return a guilty verdict. Defense counsel objected, arguing that the family of the victim did not request the verdict and that the argument was improper. The trial court immediately instructed the jury to disregard the comment related to the family of the deceased. Appeals to juror sympathy for the victim or her family constitute improper argument. *Watson, supra* at 591. Isolated comments that do not blatantly appeal for sympathy and are not inflammatory to the point of prejudicing a defendant, however, do not require reversal. *Id.* See also *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). In *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863

(2003), this Court held that reversal was not required where the prosecutor argued, "Vito Davis is not here. Mr. Davis does not have a son. Mrs. Davis does not have a son, his brother doesn't have a brother, his cousin does not have a cousin." *Id.* Because the comment was isolated and not overly inflammatory and because the trial court instructed the jury not to let sympathy or prejudice influence the verdict, reversal was not required. *Id.* In this case, the prosecutor's isolated comment was not overly inflammatory, did not call for the jury to decide the case based on sympathy or prejudice, and was specifically met with an instruction for the jury to disregard the comment. Later, the jury was reminded that it must not let sympathy or prejudice influence its decision. We conclude that reversal is not required because of the prosecutor's argument.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette